

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue date: 14Mar2002

Case No.: 2002-INA-48

In the Matter of:

JEFFRIES & CO.,
Employer,

on behalf of

TOOR NAUMAN,
Alien

Appearance: David M. Sturman, Esq.

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Toor Nauman ("Alien") filed by Jeffries & Co. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties.

STATEMENT OF THE CASE

On November 21, 1994, Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Investment Banker. Minimum requirements for the position were listed as a Master's Degree in Business Administration, and two years of experience in the job offered or as an Investment Analyst. Under "Other Special Requirements," the Employer indicated that previous experience must include corporate finance, mergers and acquisitions, international mergers,

acquisitions, and corporate finance, and investment management. (AF 57) The job to be performed was described as follows:

Determine client financial requirements, present and implement strategies to facilitate clients obtaining capital through private placements and public offerings of debt and equity securities. Advise companies on restructuring and international and domestic mergers and acquisitions assignments. (AF 57)

The CO issued a Notice of Findings (NOF) on August 28, 1996, proposing to deny labor certification based on several grounds. The CO stated that the Employer's requirements for a Master's Degree in Business Administration was unduly restrictive. The CO noted that the Alien gained qualifying experience in the occupation without a Master's Degree, and concluded that there was no documentation of the necessity of the degree, rather it appeared to be a preference for the Employer's convenience. The Employer was instructed either to delete the requirement, or justify the business necessity of the Master's Degree, or show it to be "common for the occupation in the United States." The CO stated:

The requirements cannot be merely for your convenience and personal preference. You must document that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties (AF 53-54)

The CO, citing to 20 C.F.R. 656.21(b)(5), found that the requirements set out in box 15 of the ETA did not appear to be the Employer's true minimum requirements, because at the time the Alien was hired he did not meet these requirements, and the Employer trained him or provided the necessary learning opportunities after he was hired. The Employer was instructed to remove these restrictive requirements, show why it was not feasible to hire anyone with less than these requirements, or show that the Alien obtained the required experience or training elsewhere. The Employer was notified that if it wished to retain the requirements,

you must provide substantial documentation that it is not now feasible to hire anyone with less than these requirements, or you must show that the occupation in which the alien was hired is dissimilar from the occupation for which you are seeking labor certification

The CO instructed the Employer, if it contended that the jobs are dissimilar, to provide documentation addressing the positions of the jobs in its hierarchy, whether and by whom the position was filled previously, whether the position was newly created, the relative job duties and supervisory responsibilities, prior employment practices regarding the positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries. In order to show that the Alien had the required background, the Employer was instructed to submit an amendment to the ETA 750B, signed by the Alien, showing his background in the "items at issue." (AF 54)

Finally, the CO, citing to 20 C.F.R. § 656.24(b)(2)(ii), concluded, based on a review of the resumes or applications of U.S. applicants VonErdoed, Wang, O'Bryan, Perry, Hernandez, and Parmelee, that their combination of education, training, and/or experience enabled them to perform the usual requirements of the occupation. The Employer was instructed that it could rebut this finding by "showing with specificity why each U.S. worker is being rejected for job-related reasons." (AF 55)

On October 7, 1996, the Employer submitted its rebuttal. The Employer argued that the CO's findings were premised on a lack of information about what the Employer did, what the employee's duties were, and the relationship of the requirements to the performance of these duties. The Employer stated:

We respectfully request the Department of Labor to review the end work product which this position is instrumental in producing, keeping in mind, the complexity, scope, and size of the project and liability when measuring the applicant's qualifications against this work product. We honestly believe that the position to which this petition pertains would overwhelm the applicants referred by the Department of Labor to Jefferies.

The Employer described itself as a highly specialized firm dealing with, *inter alia*, corporate acquisitions, mergers, and financing. According to the Employer, it is generally retained by major corporations in connection with investment banking assignments, with revenues in excess of \$100 million or market value in excess of \$50 million. The Employer's investment banker must determine the client companies' future ability to generate earnings and cash flow, to determine a fair value if the company is bought or sold, or to determine the amount and type of debt that the company can borrow from institutions, or to raise capital in the stock and bond markets through public offerings. According to the Employer, this is done by

analyzing financial statements prepared by the company, constructing complex models to determine business sensitivities, determining future profitability potential, capital expenditures and financing needs, analyzing publicly traded comparable companies and comparable acquisitions and competitive position. The end result is usually a legally binding contract to acquire and finance the acquisition of a company between a buyer and a seller or accessing capital markets to raise appropriate financing. (AF 24)

According to the Employer, the possibility of employing an individual without an MBA degree for this position was not even contemplated; all of the Employer's employees who fill this and similar positions have MBA degrees. As documentation, the Employer attached a list of its investment bankers, and the names of the universities where they obtained their MBA degrees. According to the Employer, it is only at the graduate level that the concepts necessary to adequately perform the duties of the position are taught.

In support of this contention, the Employer obtained a statement from Professor Michael

Edleson of the Harvard Business School; Professor Edleson's qualifications were also provided. The Employer quoted from Professor Edleson's statement:

Candidates who wish to get promoted to the associate position go to business schools for a Master's degree. A business school education builds upon the skills gained in the analyst position and teaches students frame works to analyze and create financial and strategic solutions for companies. Students are also taught latest valuation techniques as well as negotiation and management skills. In addition, broad exposure is provided to international companies and complexities of cross border transactions. Such skills are not taught at the undergraduate level.

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In conclusion, not only is an MBA degree and prior financial experience required by every investment bank for the associate position but also it is necessary to perform an associate's duties.

The Employer also represented that the banking and finance industry has a well-established career path, and that persons who wish to work as investment bankers first obtain a bachelor's degree in business or related field. They are then employed as an "analyst" in an investment banking department, usually at large financial institutions. In this position, under the tutelage of investment bankers, they learn the "world of corporate finance and mergers and acquisitions." After two to four years, they then enroll in business school to obtain an MBA. According to the Employer, an individual is capable of performing as an investment banker only after at least two years of relevant experience, and the completion of an MBA program.

The Employer stated that the transactions on which it advises its clients involve millions of dollars, and are put together by a team of professionals with in-depth knowledge of investment banking. The Employer requires employees in this position to have an MBA and previous work experience as an analyst. According to the Employer, these job requirements are unique to the Employer, and other companies in this business have the same requirements. Again, to support its contention, the Employer supplied the opinions of Professor Edleson, who discussed the requirements for an "associate" position. Common throughout the industry, according to Professor Edleson, are, *inter alia*, two to four years of investment banking and finance related experience prior to business school, and a Master's in Business Administration degree. According to Professor Edleson, these two requirements are necessary for competent performance as an investment banking associate.

The Employer also solicited the opinions of The Whitney Group, which specializes in the placement of individuals in investment banking positions. According to the Whitney Group, requirements for investment banking associates are fairly uniform across the investment banking industry. The Whitney Group noted that virtually all qualified candidates come from a very narrow segment of the country's business schools, and in many cases have worked at other investment banks as an analyst for two to four years, and then gone to business school for an MBA degree. It was noted

that these candidates are a scarce commodity, with competition among investment banks intense. With respect to the Employer, the Whitney Group noted that the high yield segment of investment banking, which is Employer's specialty, has seen rapid growth, and that there has been a significant shortage of professionals with the necessary experience and qualifications. As a result, the Whitney Group noted that many of its clients had undertaking nationwide searches, but had not been able to find qualified candidates.

The Employer also expanded on the specific requirements as set out in its ETA 750, providing a detailed discussion of the duties involved in corporate finance, mergers and acquisitions, international mergers and acquisitions, and investment management. The Employer argued that its job requirements bore a reasonable relationship to the occupation in the context of the Employer's business and were essential to perform in a reasonable manner the job duties as described.

The Employer cited to *Matter of Japan Budget Travel International Inc.*, 1990-INA-277 (October 7, 1991), for the proposition that U.S. applicants may be rejected on the face of their resumes without further review, where the resumes do not indicate experience or knowledge in the position offered, and where the applicants' knowledge was marginally related, especially where the employer explained the foundation of its determination. The Employer noted that the applicants had the opportunity to present their resumes, as well as any supplementary documentation that might support their applications. However, the applicants did not provide any evidence of knowledge and experience in the required areas, and thus were properly rejected.

The Employer described in detail the qualifications of the individuals who reviewed the resumes submitted by the applicants, as well as the reasons the Employer concluded that each of the applicants, on the face of his or her resume, was not qualified for the position. The Employer noted that the CO had determined, without explanation, that the applicants displayed a combination of education, training, and experience that would enable them to perform in the position, without any explanation. The Employer cited to *Matter of University of North Carolina*, 1990-INA-422 (1992), and *Matter of Bronx Medical and Dental Clinic*, 1990-INA-479 (October 30, 1992), for the proposition that an Employer may properly reject an applicant who lacks one or more of the stated minimum requirements for the position without further inquiry, and that the CO may not argue that the applicant nevertheless can perform the duties despite these deficiencies.

Finally, the Employer took issue with the CO's conclusion that at the time the Alien was hired, he did not meet the stated minimum requirements, and the Employer trained him or provided the necessary learning opportunities after he was hired. The Employer pointed to the ETA 750B, which shows that the Alien had his MBA degree, and just under three years of experience as an investment analyst with two other companies, including experience in each of the specific requirements.

Addressing the CO's suggestion that, as the Alien was previously employed by investment banks without an MBA degree, such a degree may be unnecessary to the position in question, the

Employer noted that the Alien worked as an “analyst,” a junior level position specifically for undergraduates. At his current position with the Employer, the Alien is responsible for supervising, evaluating, and training persons who perform work similar to that performed by the Alien as an “analyst.”

The Employer attached a copy of the Alien’s MBA degree, showing that he obtained it before he started work with the Employer. Employer also referred to the ETA forms, showing that the Alien obtained his qualifying experience before he joined the Employer. The Employer stated:

His career progression and acceptance of a senior position with our firm is commensurate with his advanced education and experience. His position and qualifications are consistent with Jefferies as well as industry practices.

On November 25, 1996, the CO issued her Final Determination (FD) denying certification. The CO stated:

NOF pointed out to you that the advanced degree you require appeared to not be supported by the nature of the job duties and that the alien was hired without experience in the items in box 15. You rebut that the Occupational Outlook Handbook says more employers prefer this degree and that the alien acquired the experience during a summer job.

The CO found that the Employer did not document that the MBA degree was essential to the performance of the stated job duties. She concluded that “all the evidence points to it being a preference.” She stated, further, that since the evidence submitted by the Employer showed that the Alien performed the job duties before he got the MBA degree, that showed that the job could be performed without the degree.

The CO also found that the Employer did not provide valid, job-related reasons for rejecting the six applicants, stating:

NOF indicated that six U.S. applicants showed basic qualification for the position and had not been given interviews to determine their qualification. You rebut by iterating the requirements found restrictive elsewhere in the Notice.

On December 27, 1996, the Employer filed its Motion to Reconsider, or in the alternative to forward the matter to the Board as an appeal. The file does not contain any indication that the CO ever reconsidered her FD, nor does it contain any explanation for the fact that it took five years to forward this file to the Board. The matter was docketed in this office on January 9, 2002.

DISCUSSION

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they may have a chilling effect on the number of U.S. workers who apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 1987-INA-569 (Jan. 13, 1989)(*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for the job in the United States. *Ivy Cheng*, 1993-INA-106 (June 28, 1994); *Lebanese Arak Corp.*, 1987-INA-683 (Apr. 24, 1989)(*en banc*).

In *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*), the Board defined the standard for establishing business necessity as requiring that the Employer show: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing in a reasonable manner the job duties as described by the employer. The first prong establishes a link between the job requirements and the employer's business, and the second prong ensures that the job requirement is related to the job duties which the employee must perform.

Here, the Employer argued that the requirements of a Master's Degree in Business Administration, and two to three years of experience as an investment analyst arise from business necessity. The Employer explained in detail how these qualifications are necessary for the position of investment banker, and offered detailed opinions from eminently qualified professionals that these requirements are standard in the industry. Indeed, the Employer in the past has required that persons in the position of investment banker have these qualifications, and the Employer submitted documentation to support this claim.

The CO summarily dismissed the evidence provided by the Employer in rebuttal, finding that the requirement of an MBA degree was a preference. The CO did not discuss or even refer to the expert opinions submitted by the Employer, or the Employer's past requirements for this position, which clearly establish that the requirement of an MBA for the position of an investment banker is customary in the industry.

The CO also concluded that, since the evidence showed that the Alien performed the job before he obtained his MBA, an MBA was not essential to performance of the stated job duties. The CO ignored the facts, as clearly set out by the Employer in its rebuttal and in its ETA 750, that the Alien worked as an "investment analyst," a position junior to that of an "investment banker," for almost three years before he obtained his MBA, and before he began working for the Employer as an "investment banker." Again, the CO did not even refer to the detailed description of the two positions, and the customary job progression, by the Employer as well as the two industry experts. The CO's factual assumptions were incorrect, and her summary dismissal of the detailed documentation provided by the Employer in Rebuttal was not warranted.

We agree with the Employer that the requirements of an MBA degree and two to three years as an investment analyst are not unduly restrictive requirements. These were not subjective requirements used by the Employer to eliminate qualified applicants; they were clearly stated in the job advertisement, and were an objective method designed to ascertain whether the applicants could perform the stated job duties, which the CO never challenged.

We also agree with the Employer that it provided valid, job-related reasons for the rejection of the six U.S. applicants. Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991). Section 656.24(b)(2)(ii) provides that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers. Where the U.S. applicant clearly does not meet a stated job requirement, the burden shifts to the CO to explain adequately why the U.S. applicant is qualified through a combination of education, training, or experience. *Houston Music Institute, Inc.*, 1990-INA-450 (Feb. 21, 1991).

In its rebuttal, the Employer provided a detailed explanation of its reasons for rejecting each of the six U.S. applicants. This was buttressed by the expert opinions discussed above, which establish the minimum educational and experience requirements to successfully perform the duties of the job, and further that they are customary in the industry. Again, the CO did not address any of this documentation, but summarily concluded that, because the requirements were, in her opinion, restrictive, the Employer could not use those requirements as a basis for rejecting the U.S. applicants. But we have found that the requirements are not restrictive, and therefore the Employer was entitled to judge the U.S. applicants' qualifications for the position against those requirements.

While ordinarily it might be appropriate to remand this matter to the CO to reconsider the Employer's rejection of the six U.S. applicants, we will not do that here. Not only did the CO completely ignore the detailed documentation submitted by the Employer in its rebuttal, she ignored the Employer's request for reconsideration, and this matter languished for five years before it was forwarded to the Board for review. Moreover, in its rebuttal, the Employer provided more than ample justification for its rejection of the six U.S. applicants, demonstrating that they lacked the education and/or experience that were the basic requirements for the position. We find that the U.S. applicants were rejected for lawful, job-related reasons, and remanding this case to the CO will only further delay the inevitable grant of certification.

Accordingly, the CO's Final Determination is reversed.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and labor certification is **GRANTED**.

SO ORDERED.

For the panel:

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LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.